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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/841,451	04/24/2001	Leslie E. Mace	4502US	5355
24247	7590	10/14/2005	EXAMINER	
TRASK BRITT P.O. BOX 2550 SALT LAKE CITY, UT 84110			NASSER, ROBERT L	
			ART UNIT	PAPER NUMBER
			3736	

DATE MAILED: 10/14/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

SP

**Office Action Summary**

Application No.

09/841,451

Applicant(s)

MACE ET AL.

Examiner

Robert L. Nasser

Art Unit

3736

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --****Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 02 August 2005.
- 2a) ☒ This action is FINAL. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-6,8-30,42-49,75-88 and 98-103 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 98-101 and 103 is/are allowed.
- 6) ☒ Claim(s) 1-6,8,10-19,21-30,42-49,75-77,79,81-86,88 and 102 is/are rejected.
- 7) ☒ Claim(s) 9,20,78,80 and 87 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_

***Claim Objections***

Claims 98-103 are objected to for being duplicates of claims 9, 20, 78, 80, 85, and 87.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-6, 8, 10-19, 21-30, 42-49, 75-77, 79, 81-86, 88, and 102 are rejected under 35 U.S.C. 103(a) as being anticipated by Anderson et al 4440177 in view of Kofoed et al 5779660 and Orr et al. Anderson et al 4440177 has a respiratory monitoring device with a housing 10 having a bore, a flow sensor 66 communicating with the bore and a first and second detectors 74 and 80. The flow sensor is a differential pressure flow sensor. It does not detect the first and second substances without removing the gas from the housing. However, Kofoed et al shows an alternate method of sensing gas, by shining infrared light through a transparent housing. As such, it would have been obvious to modify Anderson et al to use the measurement scheme of Kofoed, as it is merely the substitution of one known equivalent measurement technique for another. In addition, the carbon dioxide sensor of the combination is an infrared sensor. The oxygen sensor is not a luminescence quenching sensor. However, Orr et al teaches that a luminescence quenching sensor is a known

oxygen measuring sensor. Hence, it would have been obvious to modify Anderson et al in view of Kofoed et al to use a quenching sensor, as it is merely the substitution of one known sensor for another. With respect to claims 3-6, 10-19 and 21, Anderson does not show the structure of flow tube and its relationship to the analyte measure devices. Kofoed et al teaches a device making similar measurements that has the recited structure, which result in a compact device. Hence, it would have been obvious to modify Anderson et al to use the structure taught by Kofoed et al, to reduce the size of the device. The examiner notes that each monitor of the combination would have the structure of the monitor of Kofoed et al. The combination shows the remaining claim features, noting with respect to 47 and 48 that the window is configured to measure any respiratory airborne parameter. Claims 85 and 102 are rejected in that which side is the side or top of the housing is merely a matter of orientation. The examiner notes that if applicant were to make claim 85 depend on claim 84 or incorporate claim 84 into claim 102, this rejection would be overcome.

Claims 9, 20, 78, 80, and 87 are objected to as being dependent upon are rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Claims 98-101 and 103 are allowable.

Claims 9 and 98 define over the art of record in that none of the art shows the second detection component on a portion of the window, as claimed. Claims 20 and 99 define over the art of record in that none of the art teaches the recited arrangement of pressure ports. Claims 78 and 100 define over the art of record in that none of the art has the first window and second windows oriented in different directions. Claims 80, 87, 101 and 103 define over the art of record in that none of the art has the seat arranged to orient the sources in the manner recited.

Applicant's arguments filed 8/2/2005 have been fully considered but they are not deemed to be persuasive.

Applicant has asserted that all of the claimed elements are recited in US Application 08/680492, which issued as Kofoed. The examiner notes that applicant has not claimed priority either in the first line of the specification or on an application data sheet to 08/680492. As such, whether or not it provides support for each claim element is not relevant to prosecution. In addition, it is the examiner's position that 08/680492 does not have a first and second detection components in addition to the flow sensing component, as Kofoed only disclose one detection component and a flow sensing component. Therefore, 08/680492 does not provide support for the claims. Accordingly, applicant is not entitled to the filing date of 08/680492.

It appears to the examiner that applicant is under the impression that having not respiratory component sensors in combination with a flow sensor are disclosed in Kofoed or in 09/128918 and 09/128897. The examiner has previously indicated that no such support exists and applicant has failed to point out where in either of the prior applications such support exists. Accordingly, it is the examiner's position that no such support exists.

Applicant has asserted that the each element of the current claims find support in both 09/128897 and 09/128918, and therefore Kofoed is not available as a reference (the examiner notes that applicant switches from Kofoed on the bottom of page 2 to Orr on the top of page 3). The examiner notes that the reference was filed 7/15/1996 and both of these applications were filed 8/4/1998. In addition, Kofoed has a different inventive entity than the present invention. Accordingly, Kofoed predates both applications. In addition, the examiner notes that in order to receive the benefit of priority under 35 USC 120, the entire claim must be supported by the prior application.

In the current instance, the prior applications do not teach have first and second detection components or detecting multiple components of the breath in addition to measuring flow. As such, the current claims are only entitled to the current filing date, or April 24, 2001, and therefore Kofoed and/or are still references against the claims.

On page 3 of the remarks, applicant has asserted that a claim for priority has been made to the filing date of Kofoed. The examiner disagrees, noting that no such claim appears on the record.

Applicant has further asserted that in view of the novelty of the subject matter in Kofoed, applicant is clearly entitled to seek broadly drawn to the subject matter of Kofoed. The examiner disagrees, noting that since applicant does not claim priority to Kofoed and that the subject matter of the current claims are not disclosed in Kofoed, applicant is clearly not entitled to rely on Kofoed for priority.

Applicant has further asserted that the examiner has relied on hindsight to make the combination. The examiner disagrees, noting that no impermissible hindsight has been used.

Applicant has further asserted that there is no motivation to combine the references because Anderson and Orr have separate sensors that are not positionable along a breathing circuit with Kofoed is. The examiner notes that the Federal Circuit has established that a reference is good for all it teaches. Here, Kofoed and Orr clearly establish the equivalence of the sensors used and provide the requisite motivation. There is no requirement in that patent laws that the references be identical to be combined.

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

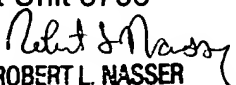
A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert L. Nasser whose telephone number is (571) 272-4731. The examiner can normally be reached on Mon-Fri, variable hours.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Max Hindenburg can be reached on (571) 272-4726. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Robert L. Nasser  
Primary Examiner  
Art Unit 3736

  
ROBERT L. NASSER  
PRIMARY EXAMINER